

## REMARKS

Claims 1-10 are pending in the application. The Examiner has rejected claims 1-3 and objected to claims 4-10. The Examiner has objected to claims 4-10 based on informalities. Applicant has amended claims 4-9 to overcome the informality objections. Applicant respectfully request reconsideration of the application. Claim 10 is original.

### *Claim Amendments*

Applicant has amended claims 1-10 to respond to the Examiner's objections. Claim 3 has been cancelled and claim 1 has been amended to include claim 3. Claim 2 and 4-9 to overcome the objections and to correct informalities. Amended matter in claim 9 can be found on page 3, lines 14 and 15 of the description. No new matter has been added and no additional fees are believed to be due.

### *Claim Rejections – 35 U.S.C. §112*

The Examiner has rejected claims 1-3 as being indefinite. Applicant has amended the claims to place them in better condition for examination. Applicant kindly asks that the Examiner reconsider this objection. Applicant kindly points out that the term “microbiological pollution rate” can be found on page 3, lines 4-15.

### *Claim Rejections – 35 U.S.C. §102(b)*

The Examiner rejected Applicants' claims 1-3 under 35 U.S.C. §102(b) as being anticipated by U.S. Pat. No. 5,560,060 issued to *Dausch et al.* (“*Dausch*”). For a claim to be rejected under this statute, it must be anticipated by the prior art. Anticipation occurs when every element of the claimed invention is found in a single prior art reference.<sup>1</sup> In addition to including every element of the claimed invention, the prior art reference must also “be

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<sup>1</sup> *Verdegaal Bros., Inc. v. Union Oil Co. of California*, 814 F.2d 628, 632 (Fed. Cir. 1987). See also, *Electro Med. Sys. v. Cooper Life Sciences*, 34 F.3d 1048, 1052 (Fed. Cir. 1994) (stating, “[a]nticipation under 35 U.S.C. §102(b) requires the presence in a single prior art disclosure of each and every element of a claimed invention. . .”); *General Elec.*

enabling and describe the applicant's claimed invention sufficiently to have placed it in possession of a person of ordinary skill in the field of the invention.”<sup>2</sup> In other words, for the prior art reference to anticipate the claimed invention, all of the elements in the claim must be found in a single piece of prior art “in exactly the same situation and united the same way to perform the identical function. . . .”<sup>3</sup>

Claims 1 and 3 rejected as being anticipated by *Dausch*

Applicant has amended claim 1 to include the limitations of claim 3, therefore Applicant will respond to the rejection of Claim 3. Claim 3 of Applicants' invention discloses, among other things, “a biosensor (7) which detects the microorganisms in the washing water” and “acceptable maximum microbiologic pollution rates (MBN0, MBN1, MBN2, MBN3) preloaded by the producer in that the microbiologic pollution rate (MBN) measured by the biosensor (7) in the washing cycles is compared”.<sup>4</sup> The Examiner has indicated that *Dausch* discloses the same elements as Applicant's claim 1. Applicants respectfully disagree with the Examiner's position.

Specifically, the Examiner has indicated that *Dausch*

“The sensor used in the dishwasher disclosed in DAUSCH may considered a biosensor in that it detects the present of foreign substances that cause turbidity of the wash water. It would be expected that these substances include microorganisms such as bacteria that result from left over food particles on dishes waiting to be cleaned in the dishwasher, for example”.<sup>5</sup>

However, *Dausch* specifically teaches a “turbidity sensor” which sense the amount of soil not microorganisms. See *Dausch*, col. 4, lines 4-8. Likewise, TURBIDITY is defined as “sediment or foreign particles stirred up or suspended, muddy or *turbid water*” in *The*

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*Co. v. Hoechst Celanese Corp.*, 740 F.Supp. 305, 313 (Del. 1990) (stating that “[i]n order to anticipate a later claim, a single prior source must contain all of the essential limitations of the claim”).

<sup>2</sup> *In re Paulsen*, 30 F.3d 1475, 1479 (Fed. Cir. 1994).

<sup>3</sup> *Sandisk Corp. v. Lexar Media, Inc.*, 91 F.Supp.2d 1327, 1336 (N.D. Cal 2000). See also, *In re Arkley*, 455 F.2d 586, 587 (P.App.Cir. 1972) (stating that “rejections under 35 U.S.C. §102 are proper only when the claimed subject matter is identically disclosed or described in ‘the prior art’”) (emphasis in original).

<sup>4</sup> See, Applicants' Claim 1.

*American Heritage Dictionary of the English Language*, 4<sup>th</sup> Ed. Further, water containing microorganisms is not necessarily turbid. Therefore, *Dausch* does not teach the detection of wash water that contains microorganisms but turbid water.

Further, the office action states that with regard to claim 3 *Dausch* “discloses a fuzzy logic system which inputs variables from a sensor in a dishwasher (col. 9, lines 1-2) and matches them with rules in a rule base to assign a confidence value.” Examiner’s Office Action p. 5. However, all of these references in *Dausch* again teach a system related to Turbidity and not to microorganism detection as in original claim 3. *Id.* Thus, *Dausch* teaches away from the present invention.

Applicants respectfully assert that *Dausch* does not disclose every limitation of claims 1 or 3, and that the Examiner has not made out a *prima facie* case of anticipation. Specifically, no where does *Dausch* teach a biosensor that detects micororganisms. In fact, as correctly pointed out by the Office Action, *Dausch* teaches a turbidity sensor not a biosensor sensor. Therefore, claims 1 and 3 were and are not anticipated by *Dausch* under 35 U.S.C. §102.

Applicant respectfully request that the Examiner reconsider Applicants’ claims 1 .

Claims 2-4 rejected as being anticipated by *Hahn*

The Examiner has indicated that *Hahn* anticipates Applicants’ claim 2. Applicants respectfully disagree with the Examiner’s assertion. Specifically, Applicants’ dependent claim 2 disclose the product of claim 1 and add additional limitations.<sup>6</sup> Applicants respectfully disagree with the Examiner’s rejection.

Because claim 2 is a dependent claims that adds further limitation to independent claim 1, it should be allowed in dependent form because independent claim 1 is not anticipated by *Dausch*<sup>7</sup>. Applicants respectfully request that the Examiner reconsider Applicants’ claim 2.

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<sup>5</sup> Examiner’s Office Action p. 4.

<sup>6</sup> See, Applicant’s claim 2

***Claim Rejections – 35 U.S.C. 103(a)***

**Applicant's Claims Are Not Rendered Obvious Under 35 U.S.C. §103 Over Any Of The Prior Art Patents**

The Examiner has rejected Applicants' claims under 35 U.S.C. §103 based on *Dausch*. Applicants respectfully disagree with the Examiner.

The Examiner has failed to establish a prima facie case of obviousness. When examining a patent application, the Examiner has the initial burden of factually supporting a prima facie conclusion of obviousness.<sup>8</sup> Additionally, when rejecting claims under 35 U.S.C. §103, it is incumbent upon the Examiner to establish a factual basis to support the legal conclusion of obviousness.<sup>9</sup> In so doing, the Examiner must make the factual determinations set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 17 (1966). Specifically, the Examiner must (1) determine the scope and content of the prior art; (2) determine the differences between the prior art and the claims at issue; and (3) determine the level of ordinary skill in the art.<sup>10</sup> In addition to these factual determinations, the Examiner must also provide "some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness."<sup>11</sup> Moreover, the analysis supporting obviousness should be made explicit and should "identify a reason that would have prompted a person of ordinary skill in the relevant field to combine the elements" in the manner claimed.<sup>12</sup>

Only if the Examiner makes a prima facie case of obviousness, does the burden shift to the Applicant for providing evidence of non-obviousness.<sup>13</sup> Obviousness is then determined based on the evidence as a whole and the persuasiveness of the arguments.<sup>14</sup> Here, the Applicants respectfully assert that the Examiner has failed to meet the evidentiary burden.

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<sup>7</sup> See, *In re Johnson*, 589 F.2d 1070, 1080 (CCPA 1978).

<sup>8</sup> See, *In re Outiker*, 977 F.2d 1443, 1445 (Fed. Cir. 1992).

<sup>9</sup> See, *In re Fine*, 837 F.2d 1071, 1073 (Fed. Cir. 1988).

<sup>10</sup> See, *Graham v. John Deere Co.*, 383 U.S. 1, 17 (1966).

<sup>11</sup> See, *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006).

<sup>12</sup> See, *KSR Int'l Co. v. Teleflex*, No. 04-1350, slip op. at 15 (U.S. 4-30-2007).

<sup>13</sup> See, *In re Outiker*, 977 F.2d at 1445.

<sup>14</sup> See, *Id.*

Additionally, the cited prior art differs from the Applicants' claims. Therefore, a person of ordinary skill in the art at the time of the invention would not have looked to the prior art cited by the Examiner to create Applicants' claims. As such, the Applicants respectfully request that the Examiner reconsider Applicants' claims.

**A. Claims 1 and 2 rejected over *Kobos et al.* (US 6138692) in light of *Kafferlein* (DE 4415823)**

With respect to claims 1 and 2, the Examiner has indicated on pages 6 of the Office Action that the rejection did not include claim 3. Applicant has amended claim 1 to include claim 3 and, therefore, kindly asks that the Examiner withdraw this objection.

**B. Claims 1 -3 rejected over *Dausch* (US 5560060) in light of *Rothgeb* (US2003/0227394)**

With respect to claims 2-4 and 6, the Examiner has indicated on pages 7 of the Office Action that:

Dausch discloses the use of turbidity sensor .... Nevertheless, this turbidity sensor may not be considered a biosensor as claimed.<sup>15</sup>

Further, *Dausch* requires that the "turbidity sensor 26 ... [is] mounted within the recirculation hose..." Col. 3, lines 42-43. However, *Rothgeb* teaches away *Dausch* as it is directed to monitoring invention used for "consumer research with respect to cleaning of laundry and/or dishes." Further, as mentioned above, *Dausch* teaches away from claim 3 of the instant invention.

Here, the Applicants respectfully assert that the Examiner has not made a prima facie case of obviousness because *Dausch* actually teaches away from Applicants' invention and therefore, the person of ordinary skill in the art at the time of the invention would not have looked to *Dausch* to create Applicants' invention.

Further, a person of ordinary skill in the art could not have looked to *Rothgeb* at the time of the invention since Applicant had invented the invention at least as early as Dec. 25,

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<sup>15</sup> See, Examiner's Office Action p. 4

2002 almost one year before the publication of *Rothgeb*. As such, a person of ordinary skill in the art could not have combined *Dausch with Rothgeb* at the time Applicant's invention.

Therefore, *Dausch with Rothgeb* cannot render Applicants' invention obvious under 35 U.S.C. §103 because a person of ordinary skill in the art would not look to this piece of prior art to create Applicants' invention.

### ***Conclusion***

Applicants believe they have addressed and responded to every point raised in the Examiner's present action. For the reasons stated above, Applicants respectfully request reconsideration of their application.

Respectfully submitted,

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